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REPLY BRIEF OF APPELLANTS

IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1948.

No. 128.

**THE FARMERS RESERVOIR AND IRRIGATION
COMPANY, a Corporation, PETITIONER,**

vs.

**WILLIAM R. McCOMB, Administrator of the Wage and
Hour Division of the United States Department of
Labor, RESPONDENT.**

**REPLY BRIEF OF THE FARMERS RESERVOIR AND IRRIGATION
COMPANY. PETITIONER.**

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September, 1948.

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REPLY BRIEF OF APPELLANTS

The Brief filed on behalf of the Respondent indicates a complete misunderstanding of the true nature of the Petitioner and the activities in which it is engaged and evidences a refusal to recognize a fact, the existence of which is a matter of judicial notice in our Western courts, namely, that in the arid states of the West irrigation is the very backbone of the agricultural industry and is "per se agriculture."

ARGUMENT

I

RESPONDENT MISCONCEIVES THE "QUESTION PRESENTED."

The "question presented" is set forth by Petitioner on Page 7 of its Petition for writ of certiorari, and by Respondent on Page 2 of his Brief. The only similarity between the two statements is in the headings. Petitioner embodies all of the facts in its presentation of the question, whereas, Respondent glanced only at the surface of the problem and bases his presentation upon the fact that Petitioner is a corporate entity and does not, as such corporate entity, own any farms.

Respondent's argument (pages 8-16 of his Brief) is divided into three major subdivisions, which we answer in order as follows:

1. Respondent argues that the agricultural exemption Section 13 (a)(6) of the Act must be narrowly construed to conform to the decision of this Court in *Phillips Co. v. Walling*, 324 U. S. 490, 493. We agree entirely with the rule announced in the Phillips Company case, but when we do so, we take into consideration the qualification that this Court attached to the general rule applicable to an exemption claimed when the Court said:

"An exemption from such humanitarian and remedial legislation, must, therefore, be narrowly construed giving due regard to the plain meaning of statutory language and the intent of Congress." (Emphasis ours)

Petitioner's complaint of the argument of Respondent in his Brief and of the majority opinion below is that neither Respondent nor the Court gave due regard or any regard to the plain meaning of the statutory language defining "agriculture" nor to the intent of Congress as plainly expressed in the Act, and as interpreted by the Administrator in his Interpretative Bulletin No. 14 (Exhibit 5-R-59-82) which deals with the subject of "agriculture."

In *U. S. v. Turpentine Co., et al.*, -111 Fed. (2d) 400,

(404-405) the Fifth Circuit discussed the term "agricultural labor" as it is used in the Social Security Act and said;

" * * * It is now a settled principle of statutory construction that Congress, or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor'; it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. This does not mean of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its term. It does mean however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough, to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. * * * "

It is our firm contention, that the rule as to narrow construction is not to be applied in such manner as would eliminate from the definition of "agriculture" that activity which has been accepted throughout the entire West for more than 100 years, as "per se agriculture", namely, irrigation of farm lands.

Respondent's second argument (page 12 of his Brief) is that the decision below is in accord with the decision of the First Circuit in *McComb v. Super-A Fertilizer Works*, 165 Fed. (2d) 824, and with the decision of the Eighth Circuit in *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 Fed. (2d) 698, where a contention identical with Petitioner's was explicitly rejected.

It is Petitioner's contention that these two cases cited by Respondent do not reject Petitioner's contention, and that they are irrelevant to the claim of exemption made by Petitioner herein.

As we have previously stated, the McComb case, *supra*, is a consideration of the legislative history of the word "production" in the Act, and all the Court said in the McComb case is:

"It seems clear to us that 'production' in Section 3(f) referred only to *agricultural* production (emphasis ours), and that it was not the intent of Congress to exempt *industrial* (emphasis ours) activity necessary to the production of agricultural goods which go into commerce."

Petitioner's contention is that the decision in the McComb case, *supra*, supports Petitioner's contention rather than Respondent's, for it clearly distinguishes between what is a *commercial* activity and what is an *agricultural* activity. The Court held that the mixing and bagging and loading of a truck with fertilizer was a *commercial* activity and not an *agricultural* activity, and that consequently the employees in question were held to be engaged in a commercial activity and not an agricultural activity, and consequently were not entitled to an agricultural exemption. In the case at bar, Petitioner's employees are not engaged in any commercial activity. The Stipulation of Facts, the Findings of the trial Court and the decision of the Court below all say, as the Court below says in its majority opinion—

"The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated. The agricultural commodities cannot be produced, and therefore no finished products can move into interstate commerce."

3. Respondent's third argument (page 14 of his Brief) becomes applicable only if the Court rejects Petitioner's main contention that *irrigation by a mutual ditch company such as Petitioner is "per se agriculture"*. If this Court rejects Petitioner's main contention then it is our position

that Petitioner (and therefore its employees) is engaged in agriculture because the activity in which the Petitioner is engaged is a practice performed by a farmer (or his employees) as incident to or in conjunction with farming operations.

2 There is nothing in the Stipulation of Facts (R. 11-25) in the Trial Court's Findings of Facts (R.106-121) nor in the majority opinion below (R.127-134) that shows that Petitioner did not assert at all stages of this case, that Petitioner's employees are, in substance and in fact, employees of the farmer-stockholders employed through the agency of Petitioner for its farmer-stockholders. The dissenting opinion (R.134-137) contains a very clear statement of Petitioner's position in this regard as follows:

"Its employees are in substance the employees of the landowners. Their compensation is paid from assessments paid by the landowners. The farmers' company makes no profit. It owns the beneficial title to no property. It is nothing more than a mutual agency organized for the convenience of the owners of land and appurtenant water rights. It is in no sense an independently operated irrigation company."

THE STIPULATION AND AGREEMENT AS TO CERTAIN FACTS

(R. 11-25) in part provides:

"3. Defendant (Petitioner here) is a non-profit corporation and is a mutual ditch company, organized and existing under particular statutes of the State of Colorado * * *"

"11. Defendant does not sell water to any one and does not carry water for hire."

"14. The Defendant as a mutual ditch company, has not (made) and can not make a profit, and has not paid and can not pay any dividends."

We firmly believe that under the agreed facts it clearly appears that Petitioner was created and exists for one purpose only and that is on behalf of the farmer-stockholders

of Petitioner to employ and keep at work ditch walkers and reservoir attendants, who will conduct the water belonging to the individual farmer-stockholders from the streams to the reservoirs and from the reservoirs to the lands of the farmer-stockholders, and to maintain, clean and repair the ditches and the reservoirs in order that the indispensable irrigation water may be delivered to the individual farmer-stockholders who own the right to use said water and make beneficial application thereof on their individual lands so that agricultural crops can be raised. Briefly, Petitioner, a corporate entity, is only an absolutely necessary convenience whereby many farmer-stockholders by combining together can do what each requires and needs to raise agricultural crops; a requirement and a need which no one farmer acting alone can supply or furnish. If each farmer-stockholder did the work that is done by the employees of the Petitioner (a single agency for a group of farmers) there would be no question but what his work would be considered "agriculture". The fact that he combined with other farmer-stockholders (an established practice vital and necessary) does not make it any less "agriculture."

II

THE CARRIAGE AND DELIVERY OF WATER FROM A PUBLIC STREAM TO FARM LANDS BY A MUTUAL DITCH COMPANY IS "AGRICULTURE."

We realize that in this portion of this Brief, we may be guilty of repetition, but our feeling, in this regard, is best described by a remark attributed to the late Mr. Justice Holmes of this Court, when the Justice stated: "Our task is not to elucidate the obscure but to emphasize the obvious."

To the people of the entire West it is obvious that irrigation by a mutual ditch company is "per se agriculture." We are not here concerned with a matter that is purely local to Colorado or any particular portion of said State, but our problem is one that affects an area that constitutes more than one-third of the entire Nation.

This Court in the case of *State of Wyoming v. State of Colorado, et al.*, 259 U. S. 496, 66 L. Ed. 999, 1019, speaking of irrigation in the arid states of Wyoming and Colorado, said:

"The lands in both states are naturally arid, and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws, and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act, which made reclamation by irrigation a condition to the acquisition. The first settlers located along the streams where water could be diverted and applied at small cost; Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both states. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught, and values mounting into large figures, would be lost."

Again in the case of *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 89 L. Ed. 1815, 1819, this Court said: "

... * * * The river basin in Colorado and Wyoming is arid, irrigation being generally indispensable to agriculture. Western Nebraska is partly arid and partly semi-arid. Irrigation is indispensable to the kind of agriculture established there. * * *

The majority opinion of the Court of Appeals (R. 130-131) recognizes that irrigation, such as we are here involved with, is indispensable to agriculture as evidenced by the following paragraph thereof:

"Here, agricultural commodities are produced on land irrigated with water furnished by the irrigation company. The agricultural commodities are processed and the finished products move in the channels of interstate commerce. Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce. The relationship of the employees to the production of the finished products which move in interstate commerce is not objectionably remote or tenuous. Instead, their work is vital and essential to the integrated effort which brings about the movement of the finished products in commerce. It is manifestly clear that the employees are engaged in a process or occupation necessary to the production of goods for commerce, within the meaning of the Act. *Reynolds v. Salt River Water Users Ass'n.*, 143 F. (2d) 863, certiorari denied, 323 U. S. 764; *Walling v. Friend*, 156 F. (2d) 429; *Meeker Cooperative Light and Power Ass'n. v. Phillips*, 158 F. (2d) 698; *McComb v. Super-A Fertilizer Works*, 165 F. (2d) 824."

The Respondent by Interpretative Bulletin No. 14, (R. 59-80) discusses at length the definition of "agriculture" as contained in the Act and in Paragraph 3, (R. 63) states:

"3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a

suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil."

and in Paragraph 51(a) (R. 63) Respondent interprets a portion of the definition of "agriculture" as follows:

"5.(a). The term 'production, cultivation growing * * * of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)' includes all customary operations in connection with raising any 'agricultural or horticultural commodities.' * * *

The majority opinion of the Court of Appeals (R.131) and the statements made in the Brief of Respondent, which are contrary to Respondent's own interpretation of the definition of "agriculture" as contained in the Act indicates a grammatical construction of the definition of "agriculture", which is contrary to the expressed intent of Congress, as appears from the Congressional Record (Vol. 83, page 9162) when Senator Thomas from Utah and Senator Johnson of California, in discussing the "agriculture" definition in the Act, made the following statements:

"Mr. Johnson of California: "I said that, in general language, agriculture is exempted from the operation of the bill."

"Mr. Thomas of Utah: "It is."

"Mr. Johnson of California: "Does the Senator know of any particular kind of agriculture that is included in the bill?"

"Mr. Thomas of Utah: "I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.""

In the case of *Damutz v. Pinchbeck*, 158 F. (2d) 883 the Second Circuit, discussed the term "agriculture" as used in the Act, and in the decision at page 883 it is said:

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course be given due effect. It is drawn in far reach-

ing language which shows the intent of Congress to make the term "agriculture" cover much more than what might be called ordinary farming activity and that is what new controls. Differing definitions of "agriculture" in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

As we read the Act, and particularly the definition of "agriculture", it is our firm conviction that agriculture as an industry is what Congress was referring to and that the exemption, "any employee employed in agriculture; * * *", Title 29, U. S. C. A. Sec. 213, was intended to cover and include any and all employees engaged in the agricultural industry, and not only such employees as may be employed by a farmer to perform work on a farm.

It is our firm conviction that irrigation by a mutual ditch company, such as Petitioner, in the arid states of the West, is agriculture. Respondent on page 14, of his Brief refers to several decisions involving farmers' non-profit cooperatives, in which it was held, that employees of such cooperatives were not exempt from the Act as, "employees engaged in agriculture." In *Lake Region Packing Ass'n v. United States*, 146 F. (2d) 157, the Fifth Circuit in speaking of a farmers cooperative said:

"* * * For it is quite clear that here, is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation. Because this is so, those acts, which were not performed in the field or in connection with getting the product from the field to the place of processing and were therefore not per se agricultural, are deprived of their agricultural character by the dominance in the operation of their commercial character. * * *" (Emphasis ours.)

We believe that the above quoted language clearly demonstrates that none of the decisions involving farmers cooperatives tends to support the position of the Respondent in our particular case. We make this statement because

it is our position and we believe the position of this Court as evidenced by its many Opinions involving water rights in the Western States, that irrigation such as the type that is performed by Petitioner is "per se agriculture."

CONCLUSION

Respondent has in his Brief asserted that the problem here involved is one, the answer to which is sought by Petitioner upon local statutory or judicial concepts. With this assertion we disagree, because the statutory or judicial concepts relied on by Petitioner are common to the entire West and, further, the judicial concepts are those that have long been accepted not only by the entire western judiciary but also by this Court as evidenced by its opinions, portions of which are quoted above. Colorado is but one of the many States that finds its main industry affected by the majority opinion below and Petitioner is but one of hundreds affected, all of whom are engaged in the irrigation of farm lands, which has stimulated, fostered and made the agricultural industry the great business that it is.

The Trial Court emphasized the obvious in stating that Petitioner and its employees were engaged in "agriculture" as that term is defined in the Act and the majority opinion of the Circuit Court of Appeals also emphasized the obvious when it stated:

"Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce."

The Trial Court and the author of the dissenting opinion in the Circuit Court followed the obvious to its logical conclusion but not so the majority in the Circuit Court, who concluded that the obvious becomes obscure when a corporate entity entered the picture.

We earnestly urge this Court to take jurisdiction because of the great public importance of the questions of

federal law which the Court of Appeals has decided, none of which has been, but all of which Petitioner submits should be settled by this Court.

A "Conditional Cross-Petition For A Writ Of Certiorari" has been filed in this cause by Respondent to which Petitioner has not filed a Brief in opposition, for it is important to Petitioner and hundreds of other mutual ditch companies that this Court settle the status of necessary office or clerical help as well as the status of ditch riders, headgate men and reservoir or lake tenders.

Respectfully submitted,

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